IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING A JUDGE: CYNTHIA A. HOLLOWAY NO.: 00-143

Florida Supreme Court Case No.: SC00-2226

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REPLY TO NOTICE OF SUPPLEMENTAL RESPONSE AND PETITION FOR ORDER TO SHOW CAUSE

COMES NOW, Respondent, THE HONORABLE CYNTHIA A. HOLLOWAY, and files this her Reply to Notice of Supplemental Response and Petition for Order to Show Cause by and through her undersigned counsel pursuant to Judicial Qualifications Commission Rule 21 and Florida Rule of Appellate Procedure 9.410, and states the following:

1. Lauri Waldman Ross, Esquire, entered her appearance as appellate counsel on behalf of the Florida Judicial Qualifications Commission on October 12, 2001. Appellate counsel filed Petitioner's Answer Brief in Response to Order to Show Cause and other appellate pleadings on behalf of the Florida Judicial Qualifications Commission.

2. During oral argument held on June 7, 2002 and in response to Chief Justice Wells' question regarding why

the Judicial Qualifications Commission dropped Charge 6, appellate counsel made the following response which later proved to be false:

> We had a witness who refused to show up for a subpoena. We had another witness. . . . We would produce the evidence we had to go forth with that claim, because there was a reasonable basis for this claim. We went forward with it. <u>We are in the middle of the hearing and Mr. Dick was one of our witnesses who was subpoenaed, refused to come to the hearing, so that left us in the position where we felt we were better off dismissing the claim.</u>

(*emphasis added*).

3. However, previously at the final hearing, after the JQC had rested and during the Respondent's Motion for Directed Verdict, JQC trial counsel, Beatrice Butchko stated that "in light of the evidence," the charge was dismissed. (Transcript, October 16, 2001 at 468-471, attached as Exhibit A).

4. After oral argument, Respondent's counsel requested clarification of these differing explanations from JQC trial counsel and appellate counsel in a letter dated June 10, 2002. (June 10, 2002 letter, attached as Exhibit B).

5. As of this date, JQC appellate counsel has not offered an explanation concerning her false statement.

While JQC trial counsel did not communicate with Respondent's counsel, she filed the Notice of Supplemental Response. The Supplemental Response acknowledges that appellate counsel's representations to this Court on June 7, 2002 were false, yet fails to address or explain why these false statements were made. Instead, trial counsel now merely explains to the Court that the decision to "drop the allegation concerning the tree incident . . . was strategic." The Affidavit of Service, attached to the Notice of Supplemental Argument, shows that on October 4, 2001 (at least ten days before the final hearing), the JQC knew that Mr. Dick was not served and was unavailable for trial. Accordingly, the JQC's attachment directly contradicts JQC appellate counsel's statements to this Court.

6. Respondent's counsel raised the JQC's dismissal of Charge Six in its Motion to Dismiss and Motion for Sanctions for two primary reasons. First, the JQC proceeded with the tree charge, without regard for the truthfulness of its witness and its ability to prove the allegations in order to create the false impression that Judge Holloway engaged in a pattern of misconduct by

abusing her judicial office for the benefit of her friends. Not only did the JQC have notice that the attorney who requested help, Ms. Jeanne Tate, was not a personal friend of Judge Holloway, the JQC had notice that its primary witness, Randy Emmerman, was not truthful when he testified that Mr. Steve Graham, an employee of the City of Tampa Parks Department had given him permission to cut down the trees. The JQC also knew Mr. Emmerman was untruthful in his contention that Mr. Graham told him that he did not need a permit to cut down trees on the City right-of-way. (October 15, 2001 transcript at 258, 275-76, portions of Mr. Emmerman's testimony is attached as Exhibit C).

Prior to trial, the JQC had spoken to Mr. Graham. (October 16, 2001 transcript, p. 491). Mr. Graham had explained to the JQC that Mr. Emmerman did not have permission to cut down the trees and that he had balked at paying the fees for the permit. (Id. at 493-94). Mr. Graham believed that Mr. Emmerman was cutting the trees down on Saturday because city officials would not be working and would not stop him. (Id. at 494.) Mr. Emmerman knew it would be less expensive to pay the fine

for improperly cutting the trees than it would be to obtain the permit which required payment for relocating the trees. (See Transcript of October 16, 2001, at 491, 487-495; proffer by Respondent's counsel of Mr. Graham's testimony is attached as Exhibit D).

Nonetheless, the JQC did not call Mr. Graham to testify even though he was present at the courthouse and dismissed the charge before Respondent could call Mr. Graham in her case in chief. This "strategic decision" by the JQC created the unfair impression that Judge Holloway engaged in a pattern of misconduct but prevented Respondent from refuting Mr. Emmerman's testimony.

The second reason for raising the tree issue is to seek clarification regarding JQC trial counsel's authority to withdraw allegations and "settle" pending matters. Appellate counsel stated in its Response to Judge Holloway's Motion to Dismiss that the JQC was prohibited from "settling" any case without consensus of the panels. (JQC Response at 11). However, trial counsel dismissed an entire charge without seeking the approval of either panel. Contrary to Appellate counsel's representations, trial counsel was not

compelled to make the decision due to a served witnesses' unexpected failure to appear. Prior to trial, the JQC knew that Mr. Dick was not served and was unavailable and knew that the City of Tampa Parks Department disputed Mr. Emmerman's assertion that he had permission to trim the trees and yet they proceeded in this allegation. It is unclear how the JQC trial counsel suddenly had the authority to dismiss a charge during trial but did not have the authority to settle the case without the necessity of a protracted final hearing.

7. The JQC has steadfastly rejected Respondent's explanation that based on the context and cadence of her deposition questions, her answers were truthful and accurate. Moreover, the JQC has refused to acknowledge that Respondent clarified any potential misunderstanding by executing an errata sheet. Instead, the JQC has assumed the most sinister factual scenario and vigorously argued that Respondent made knowing misrepresentations.

8. Respondent respectfully suggests that the JQC be held to the same level of scrutiny in considering whether appellate counsel fulfilled her obligations of diligent preparation and candor toward the tribunal. See R.

Regulating Fla. Bar 4-1.3 and 4-3.3.

9. If appellate counsel was not prepared, she had a clear duty to inform the Court that she could not answer the question and refrain from making up answers for the mere sake of responding. Further, Appellate counsel has failed to correct her statements to this Court or otherwise account for her false statements after trial counsel attempted to correct the record. Using the JQC's methodology of analyzing whether an individual intended to make a false statement, the JQC's conduct in presenting and then withdrawing the tree incident charge and appellate counsel's false explanation of the withdrawal of the charge coupled with her failure to offer any justification for her false statement, is circumstantial evidence that she made a knowing misrepresentation to this Court. If appellate counsel intentionally misled the court, the consequences should be grave.

WHEREFORE, Respondent respectfully requests this Court to order appellate counsel to show cause why sanctions should not be imposed or in the alternative, to order an evidentiary hearing to determine whether

appellate counsel intentionally made false statements on the record in this matter.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this _____ day of June, 2002, the original of the foregoing Reply to Notice of Supplemental Response and Petition for Order to Show Cause has been furnished by UPS overnight delivery to: Honorable Thomas D. Hall, Clerk, Supreme Court of Florida, 500 South Duval Street, Tallahassee, Florida 32399-1927 with copies by U.S. Mail to:

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